

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1955

F. H. Carlton v. Marion D. Carlton : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Dwight L. King; Counsel for Respondent;

Recommended Citation

Brief of Respondent, *Carlton v. Carlton*, No. 8413 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2451

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

FEB 21 1956

Case No. 8413

LAW LIBRARY

U. of U.

IN THE SUPREME COURT
of the
STATE OF UTAH

F. H. CARLTON,

Plaintiff and Appellant,

— vs. —

MARION D. CARLTON,

Defendant and Respondent.

FILED
NOV 20 1955

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

DWIGHT L. KING

Counsel for Respondent

530 Judge Building
Salt Lake City, Utah

TABLE OF CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS	5
ARGUMENT	5
POINT I. THE ORDER MODIFYING THE DECREE OF COURT IS PROPER AND SUPPORTED BY SUBSTANTIAL EVIDENCE	5
POINT II. THE ADEQUACY OF THE FINDINGS OF FACT IN THE COURT'S ORDER DOES NOT AFFECT ANY SUBSTANTIAL RIGHT OF THE PLAINTIFF	9
CONCLUSION	11

AUTHORITIES CITED

Callister v. Callister, 1 Utah 2d 34, 261 P. 2d 944.....	6
Knudsen Music Co. v. Masterson, Utah, 240 P. 2d 973	10
Love's Estate, In re, 75 Utah 342, 285 Pac. 299.....	10
Parowan Mercantile Co. v. Gurr, et al., 83 Utah 463, 30 P. 2d 207	10
Petty et al. v. St. George Garage Co., 60 Utah 126, 206 Pac. 720	10
Snyder v. Allen, 51 Utah 291, 169 Pac. 945.....	10

STATUTES CITED

2 Utah Code Annotated, 1953, § 30-3-5.....	5
2 Utah Code Annotated, Rule 59(e).....	9
2 Utah Code Annotated, Rule 61.....	10

IN THE SUPREME COURT of the STATE OF UTAH

F. H. CARLTON,

Plaintiff and Appellant,

— vs. —

MARION D. CARLTON,

Defendant and Respondent.

} Case No. 8413

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Throughout this brief, the parties will be referred to by name or as they appeared in the lower court.

Defendant is unable to accept the statement of facts contained in plaintiff's brief since a number of the crucial considerations have not been covered by the statement and will, therefore, restate the facts in this brief.

All italics are ours.

STATEMENT OF FACTS

Plaintiff obtained a divorce from defendant on the 24th day of June, 1954. Defendant did not appear, but signed a waiver. There was no written property settlement agreement and all matters concerning the property rights of the parties are contained in the Findings of Fact, Conclusions of Law and Decree.

There are four children of the marriage whose custody was awarded to defendant. Their ages range from eleven to six years. Two of the children are boys and two are girls.

The parties were married for eleven years and during that time accumulated an equity in a home at 2737 Morningside Drive, Salt Lake City, Utah, certain household goods and furnishings in the home and two automobiles, a 1954 Ford and a 1949 Plymouth sedan. The court, in the findings of fact, paragraph 5 (R. 6), found that defendant was entitled to receive \$30.00 per month for each of the minor children and \$30.00 per month as alimony. It also found that defendant was entitled to the right of possession of the home of the parties. It found that title to the household goods and furnishings should be granted to defendant. Defendant was entitled to the 1949 Plymouth automobile. The court found that, by mutual consent of the parties, at any time the home was sold, the net proceeds were to

be divided equally between the parties. Plaintiff was entitled to the 1954 Ford and a right to claim all four of the children as his dependents for income tax purposes.

The findings do not contain a finding as to the ability of plaintiff to earn money or the amounts that he earned at the time of the divorce. They do not contain any finding concerning defendant's earning capacity or actual earnings. No finding was made with respect to the duty to pay the balance of the purchase price on the home. No finding was made with respect to the debts accumulated by the plaintiff and defendant during their marriage.

The evidence concerning the earnings of plaintiff was clear. In 1954, he earned and paid income tax on \$7,800.00 (R. 36). In 1953, he earned \$8,500.00 (R. 37). The testimony also clearly indicated that Mrs. Carlton was able to earn approximately \$125.00 per month by working outside of her home.

Following the divorce, plaintiff paid the house payments of \$70.00 per month (R. 38)and two other home improvement loans of \$30.00 each. Total payment on the home was \$130.00 per month. These payments continued up through the month of May, 1955.

In May, plaintiff informed defendant that he no longer intended to pay the house payments and at the

time of the hearing on defendant's petition for modification, the house payment installments were two months in arrears (Ex. D-1). Plaintiff still continued to pay the home improvement obligations on the house occupied by defendant and the minor children.

Out of the \$150.00 paid by plaintiff to defendant as alimony and support money and her own earnings, defendant is unable to make the house payment and meet the cost of necessities for her family (R. 25).

Following the hearing on defendant's petition on the 1st of August, 1955, the trial court found that there had been a change of circumstances of the parties since the 24th day of June, 1954, and that the court should modify the decree of court entered on that day. This finding of fact is contained in the first paragraph of the court's order (R. 43).

The court ordered that the decree of court of the 24th of June, 1954, be modified to require plaintiff to pay defendant as support, the sum of \$50.00 per month per child and the sum of \$75.00 per month as alimony, making a total payment in the sum of \$275.00 per month.

A copy of this order was mailed to counsel for plaintiff on the 5th of August, 1955. No objections to the order were filed, nor was there any motion made for amendment or elaboration of the court's findings of facts, that there had been a change of circumstances.

STATEMENT OF POINTS

POINT I.

THE ORDER MODIFYING THE DECREE OF COURT IS PROPER AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

POINT II.

THE ADEQUACY OF THE FINDINGS OF FACT IN THE COURT'S ORDER DOES NOT AFFECT ANY SUBSTANTIAL RIGHT OF THE PLAINTIFF.

ARGUMENT

POINT I.

THE ORDER MODIFYING THE DECREE OF COURT IS PROPER AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

The basic power and authority of a court to modify decrees of divorce is contained in the *Utah Code Annotated*, 1953, § 30-3-5. The portion of said section which specifically grants the power states as follows (p. 539) :

“* * * Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.”

This provision does not, in its language, require that there be a change of circumstances or conditions to permit a modification of a former decree which dealt with the children or property. However, our Utah courts, early in the history of the section, read into the provi-

sion a requirement that a change of circumstances or conditions must be shown in order to justify the modification of a former decree.

This court, in a very recent decision, reviewed all of the Utah authorities concerning a proper interpretation of Section 30-3-5 and after the exhaustive review set forth clearly, the Utah law concerning the meaning of the section.

See *Callister v. Callister*, 1 Utah 2d 34, 261 P. 2d 944.

The *Callister* case was concerned with the authority of a court to modify a property distribution decree which was based upon a property settlement agreement. Cases, law review articles and annotations were carefully examined and commented on in the decision. After the review, the opinion states as follows concerning Section 30-3-5 and the powers of our Utah court (p. 41):

“* * * The object and purpose of the statute is to give the courts power to enforce, after divorce, the duty of support which exists between a husband and wife or parent and child. Legislators who enacted the law were probably aware of a fact, which is a matter of common knowledge to trial courts, that parties to divorce suits frequently enter into agreements relative to alimony or for child support which, if binding upon the courts, would leave children or divorced wives inadequately provided for. It is therefore reasonable to assume that the law was intended to give

courts power to disregard the stipulations or agreements of the parties in the first instance and enter judgment for such alimony or child support as appears reasonable, and to thereafter modify such judgments when change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract. Under the authorities herein cited such a view seems to be generally if not universally adhered to by the courts."

The original decree did not provide for either plaintiff or defendant to pay the mortgage and promissory note on the home. Only possession was awarded to defendant and the minor children. The ownership was not divided. Each party retained their community property interest in the house. Immediately following the entry of decree, plaintiff continued to pay on the obligation and discharged it for practically a year. He also paid the two other accounts payable pertaining to the home occupied by defendant and the children. These circumstances would justify an inference by the court that plaintiff intended to pay not only the \$150.00 for support of the minor children and defendant, but intended to discharge the mortgage obligations which he had incurred during the marriage. The change of circumstances occurs when he refused to continue the payment of \$70.00 per month on the home.

This change of circumstances was one which increased plaintiff's capacity to pay support and alimony. There is a net increase in his funds equal to the house

payment. The change of circumstances was one which placed a greater economic burden on defendant and the minor children. If defendant was to pay for the home and provide shelter for the children, she now had a \$70.00 per month mortgage payment to meet. It is respectfully submitted that this is the very kind of a change of circumstances which the power to modify was intended to cover. Plaintiff's ability to support has increased. Defendant's burdens for support have been increased.

Nowhere in the brief or in the record is there any claim made by plaintiff that the modification by Judge Baker imposed on him a duty to support his children and wife greater than is commensurate with his ability, nor is there any claim that the amount awarded by the court as support and alimony is a sum not reasonably necessary for the support of the four minor children and defendant.

It is submitted that where the welfare of minor children and a mother is the consideration foremost in the court's mind, the change of circumstances mentioned in the *Callister* case should not be meticulously examined to ascertain whether the exact amount awarded by modification is exactly comparable to the change in financial ability.

Plaintiff has a very substantial income. His children and former wife should be permitted to live comfortably and without anxiety concerning their shelter and living expenses.

It is respectfully submitted that the order modifying the decree of court effects a just and equitable result. There has been a change of circumstances justifying such modification. The change of circumstances was pleaded and found by the trial court. It is supported by substantial and undisputed evidence.

POINT II.

THE ADEQUACY OF THE FINDINGS OF FACT IN THE COURT'S ORDER DOES NOT AFFECT ANY SUBSTANTIAL RIGHT OF THE PLAINTIFF.

Plaintiff, in his brief, claims that the trial court erred in not making formal findings of fact, conclusions of law and decree in the order modifying the judgment of June 24, 1954.

A finding of fact was contained in the order. It stated simply that there was a change of circumstances. This, it is submitted, is an adequate finding to support the modification ordered by the court.

No objection was made to the court's order or its language. Plaintiff did not move the court to alter or amend its judgment to add more specific findings of fact as he had a right to do under the *Utah Code Annotated*, Rule 59(e). Only now, in the supreme court, does he assert that any right which plaintiff has, was, in any way, affected by the failure of the court to find more detailed facts.

It is respectfully submitted that conduct, on the part of plaintiff, constitutes a waiver of any technical insufficiency in the finding contained in the court's order.

This court, of course, is familiar with Rule 61, *Utah Code Annotated*, which requires that any error or defect which does not effect the substantial right of the parties must be disregarded. Certainly, the fact that the trial court did not make a detailed finding concerning the exact change of circumstances is not a defect, if a defect it be, which effects the substantial rights of plaintiff.

This court, under analogous circumstances, has repeatedly held that such defects may be disregarded. Where a proper judgment has been entered, defects in conclusions of law and findings of fact which do not affect the substantial rights of the parties have been consistently ignored as grounds for reversing the lower court's decision or granting a new trial.

See *Knudsen Music Co. v. Masterson*, Utah, 240 P. 2d 973; *Parowan Mercantile Co. v. Gurr, et al.*, 83 Utah 463, 30 P. 2d 207; *In re Love's Estate*, 75 Utah 342, 285 Pac. 299; *Petty et al. v. St. George Garage Co.*, 60 Utah 126, 206 Pac. 720; *Snyder v. Allen*, 51 Utah 291, 169 Pac. 945.

It is respectfully submitted that the defect, if any, in the court's finding of fact was unprejudicial and did not effect, in any way, the substantial rights of plaintiff.

CONCLUSION

It is respectfully submitted that the evidence shows a change of circumstances in the financial conditions of the plaintiff and defendant since the entry of the decree of June 24, 1954; that said change of circumstances justified the modification of the decree; that the decree, as modified, does justice between the parties and is equitable to all concerned; that the decree, as modified by the August 12th order, should be affirmed.

Respectfully submitted,

DWIGHT L. KING

Counsel for Respondent

530 Judge Building
Salt Lake City, Utah

RECEIVED copies of the within Brief of
Respondent this day of November, A.D. 1955.

KING, ANDERSON & BROWN

By
Attorneys for Appellant